UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
Petitioner,	)	
v.	)	No. 14-2239
LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL GOVERNMENT,	)	
Respondent.	)	

UNOPPOSED MOTION TO RECALL AND STAY MANDATE PENDING THE FILING OF A PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 41(d)(2) of the Federal Rules of Appellate Procedure and Local Rule 41, respondent Little River Band of Ottawa Indians Tribal Government respectfully moves for a stay of the Court's mandate enforcing its Opinion and Judgment of June 9, 2015, pending the timely filing of a petition for a writ of certiorari in the Supreme Court. The National Labor Relations Board has been informed of this motion, and confirmed that it does not oppose the relief sought.

This case was filed by the National Labor Relations Board to enforce its decision in *Little River Band of Ottawa Indians Tribal Government*, 361 N.L.R.B. No. 45 (2014). In that decision the Board held that it possessed jurisdiction under the National Labor Relations Act, 29 U.S.C. §§151-169, to invalidate a tribal labor

relations ordinance enacted by a tribal government. On June 9, 2015, a divided panel of this Court affirmed the Board's ruling over Judge McKeague's dissent. On August 24, 2015, the respondent Band filed a timely motion for rehearing *en banc*, and on August 28, 2015, the Board agreed that en banc review was warranted. On September 18, 2015, the Court denied rehearing over a dissent.

The mandate issued on September 24, 2015, under the Court's authority to "shorten or extend" the seven-day period by which a mandate must issue after the denial of a petition for rehearing. Fed. R. Civ. P. 41(b). The Band submits this Motion to Recall and Stay Mandate under the Court's rules, which allow for a timely motion to stay mandate to be submitted within seven days of the entry of an order on a petition for rehearing, 6 Cir. R. 41(b), and the Court's inherent power to recall its mandates, *Patterson v. Haskins*, 470 F.3d 645, 661-62 (6th Cir. 2006) (quoting *Calderon v. Thompson*, 523 U.S. 538, 549 (1998)).[1]

ARGUMENT

Under Rule 41(d)(2), the party seeking a stay of a mandate must show that "the certiorari petition would present a substantial question and that there is good

[1] The *Patterson* Court stated, in considering a request to recall a three-year-old mandate in a habeas corpus case, that the power to recall a mandate "is necessarily circumscribed . . . because of the need to preserve finality in judicial proceedings." *Id.* at 662 (citation omitted). That concern is not present here, however, as the mandate has issued for less than a day, the Court's rules allow a request for stay, the motion to stay the mandate is being timely filed, the NLRB does not oppose recalling and staying the mandate, and the Board has taken any action to enforce it the mandate.

cause for a stay." Both elements are met here. Judge McKeague's dissent, echoed by three other judges on a different panel,[2] demonstrates that a certiorari petition would raise a "substantial question" for the Supreme Court's consideration. Further (and as also discussed in Judge McKeague's dissent) there is a powerful argument that the panel's decision both conflicts with established Supreme Court precedent on a matter of national importance, and creates a circuit split on the proper test to apply to determine whether the NLRA applies to the operations of a tribal government. Judge McKeague's dissent argues forcefully that applying the NLRA to Indian tribal government employees is contrary to Supreme Court precedent governing tribal inherent authority over non-members allowed on to tribal lands, as well as Supreme Court precedent addressing the presumption against the abrogation of tribal sovereignty by congressional silence. Rule 41(d)(2)'s "good cause" element is satisfied here because, if the mandate is not stayed pending a petition for a writ of certiorari, the Band's labor law will be invalidated, causing irreparable harm to its sovereign authority for which it cannot adequately be compensated in the event the Supreme Court reverses this Court's decision.

[2] *Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648 (6th Cir. 2015).

A. There is a Substantial Question Whether the Panel's Decision in this Case Conflicts with Supreme Court Precedent.

Respondent's certiorari petition will argue that the panel's decision in this case conflicts with Supreme Court precedent, both in its articulation of the scope of inherent tribal sovereignty, and in its interpretation of the effect of statutory silence on tribal sovereign rights.[3] The panel held that tribal authority over non-Indians lies "at the periphery" of inherent sovereignty, justifying the Court's adoption of the Board's so-called *Tuscarora-Coeur d'Alene* framework. *See San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004) (adopting dictum from *FPC v. Tuscarora Indian Nation*, 362 F.3d 99 (1960)). In adopting that framework, the panel determined, contrary to established Supreme Court case law, that a statute which is silent with regard to Indian tribes can abrogate inherent sovereignty.

Respondent's petition will demonstrate that the Supreme Court has consistently held that tribal inherent sovereign authority extends to non-Indians invited on to tribal lands. *Montana v. United States*, 450 U.S. 544, 557 (1981); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). In *Montana*, the Court

[3] The incompatibility between Supreme Court precedent and the panel's decision is discussed in Judge McKeague's dissent from the panel decision, which is incorporated by reference into Judge McKeague's dissent from the Court's Order denying rehearing. When Judge McKeague's dissent is added to the criticisms voiced by the panel in *Soaring Eagle*, it is evident that a clear majority of the Sixth Circuit judges to have considered whether the NLRA applies to Indian tribal governments has concluded that this panel's decision is incompatible with Supreme Court precedent.

"readily agree[d]" that a tribe could prohibit nonmembers' activities on tribal lands, or regulate those activities by imposing fees or other regulations such as licensing requirements. 450 U.S. at 557. This regulatory authority stems from a tribe's "'traditional and undisputed power to exclude persons' from tribal land" because "[r]egulatory authority goes hand in hand with the power to exclude." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 335 (2008) (citations omitted). As these cases show (and as Judge McKeague concluded in dissent, slip op. at 33-34), tribal authority over tribal land, and over people who come on to that land, including non-Indians, lies at the core of sovereign power. Congress relied on this authority when it mandated that tribal law shall apply minimum federal standards to all tribal gaming employees, Indian and non-Indian alike. *See* 25 U.S.C. §2710(b)(2)(F). A substantial question is presented as to whether the panel's conclusion that this authority is merely "peripher[al]" to other tribal powers is contrary to Supreme Court precedent and impermissibly intrudes on to tribal sovereign authority. *See* slip op. at 38 (McKeague, J., dissenting). The issue is brought into sharper focus when, as is the case here, the issue concerns simply the statutory terms under which a non-Indian person will be allowed to work for a tribal government.

Judge McKeague's dissent points out that the panel's abrogation of tribal sovereign authority is not authorized by any congressional act. Slip op. at 36-37.

This raises an additional substantial question because, as the Supreme Court recently reaffirmed, the settled rule is that "unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). Although Congress has plenary authority to abrogate tribal sovereign powers, it must speak "'unequivocally'" to do so, and courts do not read statutes to abrogate sovereignty by implication. *Id.* at 2031. The proper inference from congressional silence is instead that tribal sovereign authority remains intact. *LaPlante*, 480 U.S. at 18. This rule is grounded in the "fundamental commitment of Indian law" that the judiciary must respect "Congress's primary role in defining the contours of tribal sovereignty." *Bay Mills*, 134 S. Ct. 2039. Under these principles of federal law, a statute that is silent with regard to tribal sovereign authority does not abrogate that authority.

Respondent will argue in its certiorari petition that this rule controls here because Congress in the NLRA never mentions Indian tribes. The only portion of the Act that could arguably be read to refer to Indian tribes is the exception for all governments found in 29 U.S.C. §152(2), and that section would block the Board's jurisdiction, not allow it. For decades, both the Board and federal courts have interpreted section 152(2) to exclude Board jurisdiction over various governments not named in the Act, such as insular territories, port authorities, and the District of

Columbia. *E.g.*, 29 C.F.R. §102.7 (District of Columbia and "all States, Territories, and possessions of the United States"); *Brown v. Port Auth. Police Superior Officers Ass'n*, 661 A.2d 312, 315-16 (N.J. Super. Ct. App. Div. 1995) (Port Authority of New York and New Jersey); *Chaparro-Febus v. Int'l Longshoremen Ass'n, Local 1575*, 983 F.2d 325, 329-30 (1st Cir. 1993) (Puerto Rico Maritime Shipping Authority); *V.I. Port Auth. v. SIU de P.R.*, 354 F. Supp. 312, 312 (D.V.I. 1973) (Virgin Islands Port Authority). Respondent will point out that the entire purpose of the NLRA was to govern labor relations in private industry, not to displace the sovereign authority of governments over their own employees, or to convert government enactments into mere bargaining positions subject to negotiations leveraged by employee strike threats.

Given that the NLRA was passed contemporaneously with Congress's efforts to support tribal sovereign authority in the Indian Reorganization Act of 1934, 25 U.S.C. §§461-479, and the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. §§501-509, respondent will urge that it would be implausible, at best, to infer a congressional intent to apply, by silent implication, a private-sector labor regime to tribal governmental employees. *See King v. Burwell*, 135 S. Ct. 2480, 2494 (2015). By reaching that result without express congressional authorization, respondent will urge that the panel has produced an "untenable" result, *id.* at 2495, that fails to "read the words 'in their context and with a view to their place in the

overall statutory scheme,'" *id.* at 2489 (citations omitted). Respondent will urge that the panel's decision not only runs astray from principles of Indian law, but it conflicts with basic principles of statutory construction set forth by the Supreme Court. A certiorari petition raising these arguments will present a "substantial question" warranting Supreme Court review.

B. A Substantial Question is Also Raised Because the Panel's Decision Creates a Circuit Split with the Tenth Circuit.

The panel's decision also presents a substantial question for Supreme Court review because it creates a circuit split between this Circuit and the Tenth Circuit's opinion in *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (en banc). *San Juan* is the only other circuit opinion to consider whether Congress delegated to the Board the authority to apply the NLRA to preempt a tribal enactment governing employees on tribal lands. The Tenth Circuit's opinion directly conflicts with the panel's decision in ways that are fundamental to both opinions' holdings. *San Juan* begins with the presumption that tribal authority applies to activities on tribal lands. *Id.* at 1192-94. This authority continues unless divested by Congress's "clear and unambiguous intent to restrict tribal sovereign authority." *Id.* at 1194. Silence cannot divest a tribe's sovereign authority to "enact and enforce [tribal] laws," which is at issue in both cases. *Id.* at 1197. The *San Juan* court interprets the *Tuscarora* dictum to mean that general laws may apply to proprietary rights in fee land, not to "tribal sovereign authority to govern." 276

F.3d at 1199. It also determined that the NLRA is not a generally applicable law to which the *Tuscarora* dictum would apply, due to the NLRA's exception for governments. *Id.* at 1197-98, 2000. Rather than adopt *Tuscarora-Coeur d'Alene*, the Tenth Circuit found that

> [i]n view of Congress' intention with regard to [the NLRA], and the federal policy that has long recognized tribal sovereignty, we do not think that *Tuscarora* may be applied to divest a tribe of its sovereign authority [to regulate labor relations on tribal land] without clear indications of such congressional intent which are lacking here.

San Juan, 276 F.3d at 1199. *Accord Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1284 (10th Cir. 2010) ("Congressional silence exempted Indian tribes from the National Labor Relations Act").

The Circuits are thus in irreconcilable conflict. The Tenth Circuit rejects the very test on which this Circuit rests its decision: the so-called *Tuscarora-Coeur d'Alene* framework. Judge McKeague recognized this conflict in his dissent. Slip op. at 28-29, 31-32. Judge McKeague also observed that the panel had not "identified error in the Tenth Circuit's analysis" and had failed to show "any persuasive reason to depart from the traditional Indian law principles that the Supreme Court has consistently applied." *Id.* at 31-32. The conflict between the panel's decision and the Tenth Circuit's analysis raises a substantial question for Supreme Court review.

C. There is Good Cause for a Stay Because Respondent Little River Band Will Suffer Irreparable Harm if the Panel's Opinion is Enforced by the Board.

Good cause supports a stay in this case. Board enforcement of the panel decision will irreparably harm the Little River Band by invalidating a carefully crafted labor ordinance and thus significantly interfering with the Band's exercise of its inherent sovereign authority. The Band will be unable to enforce its laws governing labor relations with its own employees. Those laws are expressions of the Band's inherent power to govern itself, to condition entry on to tribal lands, and to strike a balance between workers' rights and the rights of the public to secure governmental services. Interference with the exercise of these core aspects of tribal sovereignty will work a severe injury to the Band. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250-51 (10th Cir. 2001). Monetary damages will be unavailable to make good this injury because injuries to sovereignty are difficult to quantify, *id.* at 1251, and because the NLRB is protected from damages suits by the sovereign immunity of the United States, *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 146 n.4 (1971). Granting the requested stay will protect the Band from harm until the petition for certiorari is resolved, while still permitting the implementation of whatever remedy is eventually ordered by this Court or the Supreme Court after the certiorari proceedings are concluded.

CONCLUSION

For the foregoing reasons, and particularly in light of the Board's non-opposition, respondent Little River Band respectfully requests that this honorable Court recall and stay the mandate in this appeal pending the timely filing of a petition for a writ of certiorari.

Respectfully submitted,

SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP
Counsel for Respondent

s/ Lloyd B. Miller
By: _____
Lloyd B. Miller
Douglas B.L. Endreson
Frank S. Holleman

1425 K Street, N.W., Suite 600
Washington, D.C. 20005
(202) 682-0240
F: (202) 682-0249
lloyd@sonosky.net
dendreson@sonosky.com
fholleman@sonosky.com

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2015 I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP
Counsel for Respondent

s/ Lloyd B. Miller
By:_____
Lloyd B. Miller

1425 K Street, N.W., Suite 600
Washington, D.C. 20005
(202) 682-0240
F: (202) 682-0249
lloyd@sonosky.net